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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Reserved on: 06th July, 2021
Decided on : 28th July, 2021

+ **CRL.REV. P. No. 82/2021 and CRL.M.(BAIL) 172/2021**

QING SHI

..... Petitioner

Through : Mr.Anil Sapra, Sr. Advocate with
Ms.Varuna Thakur and Mr.Bhaskar
Tripathi, Advocates.

versus

STATE

..... Respondent

Through : Mr.M.S.Oberoi, APP for the State
with SI Bhagwan Singh, Special
Cell.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J. (*Through Video Conferencing*)

1. The petition is filed against the impugned order dated 16.12.2020 passed by the learned Additional Session's Judge-02, Patiala House Courts New Delhi (hereinafter referred learned *Appellate Court*) in Criminal Revision No.65/2020 filed by the State in case FIR No.230/2020 under Section 3/4/5 of the Official Secrets Act and Section 120B IPC registered at police station Special Cell thereby reversing the order 08.12.2020 passed by the learned Chief Metropolitan Magistrate, New Delhi District, Patiala House Courts, New Delhi (hereinafter referred learned *Trial Court*)

2. The petitioner herein was shown to have been arrested in the above case and was in judicial custody since 27.09.2020. She was admitted to bail vide bail application under Section 167 (2) Criminal Procedure Code (*Cr P*

C) vide order dated 08.12.2020 passed by the learned Trial Court. However, in the revision filed by the State, learned Appellate Court vide impugned order dated 16.12.2020 set aside the impugned order dated 08.12.2020 passed by the learned Trial Court. The order passed by the learned Appellate Court is challenged by petitioner in this Court.

3. Admittedly, the petitioner was arrested in this case on 19.09.2020 and the period of 60 days for filing the charge sheet expired on 20.11.2020. The application under Section 439 Cr.P.C. for grant of bail was moved by the petitioner on 26.11.2020 and it was only thereafter the charge sheet was filed on 28.11.2020. Later another application under Section 167(2) Cr.P.C. was also filed on 04.12.2020, but it was dismissed.

4. The learned senior counsel for the petitioner submits since the application under Section 439 Cr P C was moved on 26.11.2020 for grant of bail, prior to the filing of the charge sheet on 28.11.2020 and since the petitioner was prepared to *furnish* the bail bonds, she ought to have been admitted to bail per Section 167(2) Cr.P.C despite the fact no formal application was filed under such provision. It is submitted as per law the only requirement is on expiry of period of 60 days from the date of arrest, where no charge sheet is filed, if the petitioner is prepared to *furnish* the bail bonds, she/he ought to be admitted to bail. Reliance is made to the decision of this Court in *Subhash Bahadur @ Upender vs State (NCT of Delhi)* Bail Application No.3141/2020 dated 06.11.2020.

5. On the other hand, the learned APP for the State argues the application moved on 26.11.2020 was never under Section 167(2) Cr.P.C and as such no default bail is to be granted. It is argued when an act need to

be performed in a manner prescribed under the law it has to be performed in such manner only and if it is not done in such prescribed manner, such act shall have no existence in the eyes of law. It is also submitted if the petitioner had a right to file an application under Section 167(2) Cr.P.C. she ought to have moved an application only under such Section and not otherwise and moving of an application under Section 439 Cr.P.C. would not serve any purpose.

6. Thus, the issue before me is whether an application under Section 439 Cr.P.C. for grant of bail filed on 26.11.2020 i.e. after the expiry of 60 days from the date of arrest and before filing of the charge sheet, would be maintainable and if on such an application, default bail can be granted to the petitioner on principles enshrined under Section 167(2) Cr.P.C.

7. I need not to dwell much in the matter since this issue is *squarely covered* by the decision of the Coordinate Bench of this Court in *Shubhash Bahadur @ Upender* (supra). The following paragraphs are relevant:-

18. There is yet another aspect which requires consideration – that is whether the petitioner was entitled to bail under the Proviso (a) to Section 167(2) of the Cr.PC. The petitioner was arrested on 10.01.2020 and his detention in custody for a period of sixty days expired on 10.03.2020. Concededly, the petitioner became entitled to a bail in default under the Proviso (a) to Section 167(2) of the Cr.PC (hereafter also referred to as ‘default bail’). Although the petitioner had moved bail applications twice, the same were rejected. Concededly, an indefeasible right had accrued to the petitioner for being released on default bail and there is no dispute that if an application mentioning the said provision was made, the petitioner would necessarily have to be released on bail. However, the learned APP submits that since the petitioner did not avail of his indefeasible right for default bail, the same was lost on the chargesheet being filed on 14.09.2020.

19. According to Ms Chauhan, learned APP, it is not

sufficient that the petitioner had made an application for bail. According to her, it would be necessary for an accused to apply for bail specifically mentioning the provisions of Section 167(2) of the Cr.PC and any application moved under Section 439 of the Cr.PC could not be construed as the accused availing of his indefeasible right to default bail.

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“40. In our opinion, in matters of personal liberty, we cannot and should not be too technical and must lean in favour of personal liberty. Consequently, whether the accused makes a written application for “default bail” or an oral application for “default bail” is of no consequence. The court concerned must deal with such an application by considering the statutory requirements, namely, whether the statutory period for filing a charge-sheet or challan has expired, whether the charge-sheet or challan has been filed and whether the accused is prepared to and does furnish bail.

41. We take this view keeping in mind that in matters of personal liberty and Article 21 of the Constitution, it is not always advisable to be formalistic or technical. The history of the personal liberty jurisprudence of this Court and other constitutional courts includes petitions for a writ of habeas corpus and for other writs being entertained even on the basis of a letter addressed to the Chief Justice or the Court.

26. In *Arvind Kumar Saxena (supra)*, the accused was arrested by the Crime Branch on 03.06.2017 and he was placed in judicial custody. The statutory period of sixty days from the date of arrest expired on 04.08.2017. Thereafter, on 19.09.2017, he filed an application for bail under Section 439 of the Cr.PC. The said application was fixed for hearing on 26.09.2017. The chargesheet in that case was filed on 20.09.2017. Thereafter, on 21.09.2017, the applicant filed another application seeking bail under Proviso (a) to Section 167(2) of the Cr.PC, which was rejected because prior to the said application the investigation agency had filed the chargesheet. However, the petitioner had preferred an application for bail under

Section 439 of the Cr.PC prior to filing of the chargesheet and after a period of sixty days from the date of his arrest had expired. In this context, this Court observed as under:

“The period of incarceration of the petitioner from the date 19.09.2017 when he sought the grant of bail implicitly also on the ground that he was arrested on 03.06.2017 and was willing to continue to join the investigation, indicating thereby that the investigation was not complete and did not set completed till submission of the charge-sheet on 20.09.2017 cannot be overlooked and thus cannot extinguish the indefeasible right of “default bail” to the petitioner.”

29. In Bikramjt Singh v. State of Punjab: Crl. A. No. 667 of 2020, decided on 12.10.2020, the Supreme Court observed as under:

“We must not forget that we are dealing with the personal liberty of an accused under a statute which imposes drastic punishments. The right to default bail, as has been correctly held by the judgments of this Court, are not mere statutory rights under the first proviso to Section 167(2) of the Code, but is part of the procedure established by law under Article 21 of the Constitution of India, which is, therefore, a fundamental right granted to an accused person to be released on bail once the conditions of the first proviso to Section 167(2) are fulfilled.”

32. A plain reading of the Proviso (a) to Section 167(2) of the Cr.PC indicates that an accused would necessarily have to be released on bail “if he is prepared to and does furnish bail”. Thus, in cases where the statutory period of sixty days or ninety days has expired, the accused would be entitled to be released on bail provided he meets the condition as set out therein – that is, he is prepared to furnish and does furnish bail. It is important to note that there is no provision requiring him to make any formal application.

34. It is also necessary to bear in mind that courts have consistently leaned to resolve the tension between form and substance, in favour of substance and have used the interpretative tools to address the substance of the matter.

In Ajay Hasia Etc v Khalid Mujib Sehravardi & Ors:1981SCR(2) 79 had, in an altogether different context, observed that “where the constitution fundamentals vital to maintenance of human rights are at stake, functional realism and not facial cosmetics must be the diagnostic tool, for constitutional law must seek the substance and not the form”. Thus, if in substance the essential conditions as set out under the Proviso (a) to Section 167(2) of the Cr.PC are met and complied with – that is (i) if the investigation has not been completed within the period of sixty or ninety days, as the case may be, from the date of arrest of the accused; and (ii) if the accused is prepared to offer bail – then there would be no justifiable reason to detain the accused.

35. *As noticed above, the petitioner had, unequivocally, stated that he was ready to furnish bail and provide a sound surety. He had further indicated that he would ready and willing to comply with any condition that may be imposed by the Trial Court and had also undertaken to appear before the Trial Court as and when required. Clearly, the Proviso to Section 167(2)(a) of the Cr.PC did not require the petitioner to do anything more except to indicate that he is prepared to furnish bail. Of course, he would be released on bail only if he did so.*

36. *The Supreme Court in the case of Uday Mohanlal Acharya v. State of Maharashtra: (2001) 5 SCC 453 had observed as under:*

“13. In our considered opinion it would be more in consonance with the legislative mandate to hold that an accused must be held to have availed of his indefeasible right, the moment he files an application for being released on bail and offers to abide by the terms and conditions of bail.”

37. *In the present case, there is no doubt that the petitioner had applied for being released on bail and had offered to abide by the terms and conditions of bail. Bearing that in mind, it is at once clear that the petitioner would be entitled to default bail even though he had not specifically mentioned the provisions of Section 167(2) of the Cr.PC in his application.*

42. *As explained by the Supreme Court in a number of decisions, the Proviso to Section 167(2) of the Cr.PC is intrinsically linked to the right under Article 21 of the Constitution of India that “no person shall be deprived of his life or personal liberty except according to the*

procedure established by law". It embodies a safeguard that circumscribes the power to detain an accused pending investigation. Keeping this principle in mind and the consistent view of the Supreme Court that in matters of personal liberties, it would not be apposite to curtail the same on technicalities, this Court is of this view that the petitioner would be entitled to default bail. This is also considering the fact that the petitioner had indicated in unequivocal terms that he desires to be released on bail and he is ready to furnish surety for the same.

8. No doubt, the petitioner herein moved an application for grant of bail under Section 439 Cr P C on 26.11.2020 *i.e.* prior to the expiry of statutory period of sixty days for filing of the charge sheet and admittedly, the charge sheet was filed beyond the period of sixty days *i.e.* on 28.11.2020, hence, it cannot be said the petitioner was not ready to *furnish her bail bond* after the expiry of statutory period of sixty days and thus would be entitled to be released on bail, though the said application was not specifically under Section 167(2) Cr PC.

9. In the circumstances, the petition is allowed. Consequently, the impugned order dated 16.12.2020 passed by the learned Appellate Court in Criminal Revision No.65/2020 is set aside. The petitioner be released from Prison on her furnishing a personal bond in the sum of Rs.1.00 lac with one surety of the like amount to the satisfaction of the learned Trial Court / Duty Magistrate. She shall not leave the country without permission of the learned Trial Court; shall also surrender her passport to the Investigating Officer. The petitioner is directed to furnish her contact details/address to the Investigating Officer and shall make video call to the Investigating Officer in the first week of every month and shall keep her mobile location app open at all time.

10. The petition stands disposed of in above terms. Pending application, if any, also stands disposed of.

11. Nothing observed herein shall have any bearing on merits of the case pending trial before the learned Trial Court.

12. Copy of this order be communicated electronically to the learned Trial Court /Jail Superintendent for information and compliance.

JULY 28, 2021

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YOGESH KHANNA, J.

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